**IN THE HIGH COURT OF SOUTH AFRICA**
**FREE STATE DIVISION, BLOEMFONTEIN**

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| **Reportable:** | **NO** |
| **Of interest to other Judges:** | **NO** |
| **Circulate to Magistrates:** | **YES** |

Case no: **6359/2024**

In the matter between:

**PETRUS JACOBUS HENDRIK DE BRUIN** Applicant

and

**THE STATE (DIRECTOR OF PUBLIC PROSECUTIONS)** 1st Respondent

**THE MAGISTRATE OF THE MAGISTRATES' COURT**
**FOR THE FEZILE DABI DISTRICT HELD AT KOPPIES** 2nd Respondent

**Coram:** DAFFUE J
**Heard**: 09 NOVEMBER 2024
**Judgment**: 09 NOVEMBER 2024
**Reasons delivered:** 25 NOVEMBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12H00 on 25 NOVEMBER 2024.

**Summary:** A Magistrates' Court postponed a bail application at the request of the prosecutor notwithstanding information that the Investigation Officer did not object to bail. The accused person was well-known in the district where he was born. He owns several farms and has been farming for his own account for the last seventeen years. He is married with minor children. He approached the High Court on an urgent basis to be granted bail. Counsel appearing on behalf of the Director of Public Prosecutions agreed with the applicant's counsel that bail be granted in the amount of R5 000, subject to certain conditions. The court considered the

circumstances to be exceptional and granted bail, but warned that the judgment should not be seen as *carte blanche* to all accused persons to approach the High Court as a court of first instance whilst proceedings are pending in the lower courts.

REASONS

**Daffue J**

[1] On Saturday morning, 9 November 2024, I was on urgent court duty. I attended chambers, preparing the matters allocated to me for the upcoming week. I received notification of an urgent bail application and soon thereafter the application papers were filed. On the time set down for the hearing the legal representatives of the applicant and the Director of Public Prosecutions, Bloemfontein (the DPP) approached me in chambers, confirming that they had reached an agreement for the release of the applicant on bail, subject to certain conditions.

[2] I granted the following order:

'**BY AGREEMENT BETWEEN THE PARTIES** the following order is made:

1. Bail is set at R 5 000.00 (five thousand rand) and on further condition that the accused shall not interfere with, or intimidate the complainant and/or any other potential state witnesses and/or contact or discuss the complaint against him with any state witnesses or potential state witnesses, a list of state witnesses to be provided to the accused by the investigating officer forthwith.
2. The accused shall report to the Koppies police station every Friday between 06H00 and 18H00 until the conclusion of this matter.
3. The accused shall appear in the Koppies Magistrates Court on 15 November 2024 and all other dates to which the case may be postponed.
4. This order shall be sent by the registrar of this court electronically to the Magistrate of Koppies as well as the head of the Correctional Centre in Kroonstad in order for the applicant to be released on bail on receipt of the bail amount.

**THE FOLLOWING ORDER IS NOT BY AGREEMENT:**

5. The above order which is made by agreement is exceptional and therefore, reasons shall be provided electronically to the parties in due course.'

[3] When I was informed that the applicant would seek to be released on bail, my initial inclination was that such application should not be granted. The High Court is ordinarily not the court to consider bail applications. However, as I was awaiting the matter to be heard, I did some research on receipt of the application papers. More about this later.

[4] The previous day, to wit Friday 8 November 2024, the applicant appeared for the first time in the Magistrates' Court, Koppies. His application for bail was postponed to 15 November 2024 at the request of the prosecutor. The applicant was not impressed with the decision and decided to approach the High Court on an urgent basis.

[5] The following material facts appear from the applicant's founding affidavit:

a. he is a 38-year-old married farmer with minor children who has grown up in the district of Koppies where his family has been farming since his birth;

b. he owns several farms in the districts of Koppies and Heilbron and he personally has been farming in the Koppies district for the last 17 years, employing 35 employees at this stage;

c. on 4 November 2024 he was informed by the Local Detective Commander of the South African Police Service (SAPS) that he was a suspect in a case docket opened on 2 November 2024;

d. he, through his attorney, arranged with the commander to meet at the police station the next day where they met her as well as the Investigating Officer (IO), Constable Lerato Moloi;

e. the IO informed them of the charges of attempted murder and crimen iniuria that occurred during the morning of 2 November 2024, the complainant being one of the applicant's employees;

f. the Magistrates' Court in Koppies sits on Mondays and Fridays only and it was agreed with the two police officers that the applicant and his attorney would meet them the next Friday, 8 November 2024 at 07:30 at court;

g. the IO confirmed at the initial meeting that she needed to verify the applicant's criminal profile on the SAPS system;

h. the IO also indicated that a medical report, a J88 was obtained in respect of the complainant, that the doctor merely noted marks which he indicated as bruises and consequently, the IO confirmed on request of the applicant's attorney that it was apparent that no serious bodily harm was inflicted and therefore s 60(11) read with Schedule 5 of the CPA was not applicable;

i. although the applicant and his attorney consulted for the first time with the police officers on 5 November 2024, which was a Tuesday, the applicant was not arrested then, but only on Friday the 8th when all the necessary paperwork had been completed;

j. by Friday, 8 November 2024, the IO had verified the applicant's address and his criminal profile and he was placed in the holding cells as she believed that she could not grant police bail, but confirmed that she did not oppose bail and would recommend that bail be set in the amount of R 2 000;

k. the IO also requested a commitment from the applicant that he would not interfere with any witnesses or potential witnesses which he gave to her apparent satisfaction;

l. when the applicant appeared before the magistrate at 11h50 on Friday, 8 November 2024, the prosecutor opposed bail in the absence of the IO and requested a remand for a formal bail application to be held on the next Friday, 15 November 2024;

m. applicant's attorney objected to the request and indicated on record – as is also evident from the transcribed record attached to the founding affidavit - that the IO was not opposed to the applicant's release on bail and urged the magistrate to stand the matter down for the IO to testify;

n. upon a query by the magistrate in this regard, the prosecutor pertinently avoided answering the magistrate's question, implying that the applicant was interfering with state witnesses as she was not sure from where he got his information, as is evident from her version which I quote *verbatim*:

'Number one, this is interfering with state witnesses, I am not sure where he got that information from, this is state's case Your Worship, I am saying that I am opposed to bail at this point in time…';

o. the prosecutor continued to say that there were two other bail applications on the roll that day which should get priority as they had been postponed from the previous week, also insisting as follows:

'this is a first appearance, the arrangement that was made between the accused person and the police and what, has nothing to do with me at this stage, as I am now in possession of the docket and it is now my case as the *dominus litus* Your Worship, as it pleases the Court.' (emphasis added)

p. when the applicant's attorney asked that the matter not be postponed to the next Friday the 15th, but the next Monday, the prosecutor insisted that s 50(6) of the Criminal Procedure Act allows this, the SAP69s would not be obtained by then and again reiterated that 'this is the state's case at this stage… I do not even believe that the IO will be on duty.'

[6] Section 60(1) of the Criminal Procedure Act 51 of 1977 (the CPA) reads as follows:

'(1) *(a)* An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

*(b)* Subject to the provisions of section 50(6)*(c)*, the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.

*(c)* If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court.' (emphasis added)

[7] Whilst waiting for the application to be heard, I had time to consider the following two judgments, to wit *Majali v S (Majali)*[1] and *Magistrate, Stutterheim v Mashiya (Magistrate Stutterheim).*[2] In *Magistrate Stutterheim* a single judge of the High Court directed the magistrate adjudicating a bail application to hear the addresses of the prosecutor and defence attorney within a few hours from making the order and further directed the magistrate to give judgment that same day. The Supreme Court of Appeal held as follows:[3]

'To summarise: even if the magistrate's postponement of the bail proceedings was unjustified and unreasonable, and the respondent was therefore entitled to a prompt decision on bail, no case was made out before Pillay J for subjecting the magistrate's conduct of the proceedings to the time specifications the order contained. These were in the circumstances unwarrantably constricting and demeaning to the magistrate, and the order must therefore be set aside.'

[8] The following is however important from the facts contained in *Magistrate Stutterheim.* After the magistrate heard the arguments of both parties, he declined to grant judgment that same day as directed by the High Court and reserved his judgment. Thereafter, the accused's counsel applied to the full bench of the High Court for his release on bail. Kroon and Leach JJ heard argument on a Saturday evening. The DPP representative submitted that, based on the record provided, he was unable to submit that bail should have been refused. The full bench accepted that there were grounds to exercise the High Court's inherent jurisdiction to intervene in the

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[1] (41210/2010) [2011] ZAGPJHC 74 (19 July 2011).
[2] 2004 (5) SA 209 (SCA).
[3] *Ibid* para 27.

uncompleted proceedings and granted bail subject to certain conditions. I pertinently wish to point out that, although the Supreme Court of Appeal referred to the proceedings before the full court and its decision to grant bail, those proceedings, although not the subject of an appeal to the SCA, were not criticised at all.

[9] In *Majali* the bail application in the Magistrates' Court was postponed whereupon the applicant launched an urgent bail application to the High Court who released him on bail, subject to certain conditions. I agree in principle with the reasons advanced in *Majali*, without having to repeat all these. Firstly, although it is apparent that the High Court has inherent jurisdiction in matters of this nature, the power to intervene shall be exercised in exceptional circumstances only, for example when there is 'no lawfully justifiable reason to detain an arrested person.'[4]

[10] Section 50(6)(d) provides that a lower court may postpone bail proceedings for a period not exceeding seven days at a time if it is of the opinion that it has insufficient information to its disposal to reach a decision on the bail application, or if it appears to the court to be necessary in the interest of justice to do so. It reads as follows:

'*(d)* The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if-

(i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;

(ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A);

(iii) .....

(iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to-

*(aa)* procure material evidence that may be lost if bail is granted; or*(bb)* perform the functions referred to in section 37; or

(v) it appears to the court that it is necessary in the interests of justice to do so.'

[11] Unlike popular belief amongst some, perhaps certain prosecutors, it is not the prosecutor's function to ensure that the accused person remains in custody at all costs. I do not suggest that the facts *in casu* are on par with the facts in *National*

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[4] *Majali loc cit* para 14 with reference to the authorities quoted.

*Director of Public Prosecutions v Swarts*[5] *(Swarts)*, but it is important to note that the trial court held the NDPP liable for the unlawful detention of the bail applicant. The decision was confirmed on appeal. In that case the bail applicant handed himself over to the police who had no objection to his release on bail or warning. The court *inter alia* stated the following:

'The case was simply as a matter of routine postponed for further investigation, in circumstances where further investigation was clearly not required. This reflects very poorly on the prosecutors and, indeed, the Magistrate. What occurred in the court was a mechanical process with no consideration whatsoever being given to the right of the respondent to have been released on bail or warning.'

[12] In *Swarts* the prosecutor who had access to the police docket simply failed to bring the bail court's attention to the fact that the investigating officer stated in his affidavit facts that would have entitled the accused to bail at his first appearance. It was confirmed in *Swarts* that applications for postponement cannot be granted mechanically, or as of right, or for the mere asking. The prosecutor seeking an indulgence must present satisfactory reasons justifying the granting of a postponement.

[13] *In casu*, the prosecutor acted without the intervention of the IO. There was nothing substantial to support her version. The SAP69s are not required during bail proceedings. The applicant's criminal profile on the SAPS system has been obtained, indicating no previous convictions. Furthermore, the prosecutor submitted that she had not obtained statements of all witnesses and that these possible witnesses were staying on the applicant's farm. I would have expected the IO to inform the prosecutor that statements of eye witnesses were still outstanding and that she feared that the applicant might interfere with, or intimidate them. There is absolutely nothing on record in this regard. In any event, bail conditions can always be set to prevent interference or intimidation. The alleged incident occurred in the morning of 2 November 2024. It would have given ample time to the IO to obtain all necessary statements, but if that was impossible, the IO might have alerted the prosecutor that the applicant might interfere with the investigation and that bail should be refused. There is not an iota of evidence in this regard.

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[5] (CA 164/2019) [2020] ZAECGHC 64 (17 June 2020) para 20.

[14] Although I might not be prepared to grant bail if it was opposed on proper grounds, it is not necessary to dwell onto this aspect any further. However, a warning should be sounded. This matter was based on exceptional circumstances *in casu* and in particular the agreement reached between the legal representatives of the applicant and the DPP, as well as the prosecutor's failure to consult the IO. Bail applicants do not have *carte blanche* to approach the High Court as a court of first instance in each and every case where they are dissatisfied with bail processes in the lower courts. The floodgates are not open. Every application will still have to be considered on its merits, bearing in mind that exceptional circumstances should be present.

[15] It is apposite to refer to the charge of attempted murder. Section 60(11) stipulates as follows:

'Notwithstanding any provision of this Act, where an accused is charged with an offence-

*(a)* .....;

*(b)* referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release; or

*(c)* contemplated in section 59 (1) *(a)* (ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.'

An onus is cast on an accused person if Schedule 5 applies. The Schedule is clear and unambiguous. The crime of attempted murder is qualified: it must involve the infliction of grievous bodily harm. If this is not the case, the onus does not shift to the accused person in terms of s 60(11)(b).

[16] The court considered the right to freedom in *S v Bennett*[6] and concluded:

'Section 12(1) of our Constitution confers on everyone the right to freedom which includes the right not to be detained without trial. That is the fundamental premise in a case such as this. It has long been the fundamental premise of our common law. See *Minister van Wet en Orde en Andere v Dipper* 1993 (2) SACR 221 (A) and 1993 (3) SA 591 (A) at 224g and 595G and *S v Du Plessis en 'n Ander* 1993 (2) SACR 379 (T) at 386b; see also *S v Petersen and*

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[6] 2000 (1) SACR 406 (W) at 408e-f; see also *S v Mabapa* 2003 (2) SACR 579 (TPD) para 8.

*Another* 1992 (2) SACR 52 (C) and *S v Acheson* 1991 (2) SA 805 (Nm). The constitutional rights to freedom have, of course, to be limited in terms of s 36 thereof but only to the extent that it is reasonable and justifiable in an open and democratic society. The presumption of innocence operates in favour of an applicant even where there is a strong prima facie case against him. See S v Essack 1965 (2) SA 161 (D) at 162C and S v Thornhill *(2) 1998 (1) SACR 177 (C) at 181D - H.* The presumption of innocence, according to Du Toit and others in *Commentary on the Criminal Procedure Act* at 9-2 remains a cornerstone of bail and this explains why the courts should in principle lean in favour of the liberty of the bail applicant. Sections 2 and 3 of the Prevention of Family Violence Act provide for drastic and unusual measures infringing upon a person's liberty. They must accordingly be applied with due caution.'

[17] I decided to put my reasons for granting bail on record in the hope that the prosecutor that appeared in this case, and perhaps all other prosecutors across the country, take note of their responsibilities as is apparent from legislation, authorities and the Prosecution Policy issued by the NDPP in terms of s 12(1)(a) of Act 32 of 1998.

[18] The Prosecution Policy is a public document and should surely be well-known to all prosecutors. Unfortunately, only the 2013 edition is available on the internet. I am fully aware that the NDPP has issued various policy directives and circulars since then, but these are apparently confidential. I shall quote some of the provisions from the 2013 edition that apply in this particular case. The first two paragraphs under the heading, Purpose of Policy Provisions, read as follows:

'The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the NPA and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they should exercise their powers, carry out their duties and perform their functions. This will serve to make the prosecution process more fair, transparent, consistent and predictable.'

[19] The discretion to be exercised by a prosecutor relates also to the decision whether or not to oppose an application for bail or to release an accused person who is in custody following arrest. The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. Prosecutors must present the facts of a case to a court fairly and they must disclose information favourable to the defence even though it may be adverse to the prosecution case. This

notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. But, 'prosecutors should not oppose the release from custody of an accused person if the interests of justice permit.'[7]

[20] In Item 7 of the Prosecution Policy the '[E]ffective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process' and '[W]ith regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close cooperation, with mutual respect for the distinct functions and operational independence of each profession.' (emphasis added)

[21] It is therefore clear that the prosecutor has a duty to place before the court all relevant information which the court needs to exercise its discretion with regard to the grant, or refusal of bail, or even the postponement of the bail application. The authorities do not have to be quoted in much detail, but it is clear that the NDPP has been held liable for the neglect of prosecutors to bring critical information to the attention of the court. Tshiki J stated the following in *Botha v Minister of Safety and Security and Others; January v Minister of Safety and Security and Other*[8]

'33. Prosecutors also have a duty to establish facts which justify the further incarceration of a detained person before he or she can apply to the court for the detainee's further incarceration. One of the methods expected to be used by the prosecutor is to establish from the police official investigating the case, all the facts which would justify the further detention of the arrested person. He or she has to protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.' (emphasis added)

[22] Tshiki J emphasised the need for proper cooperation between the police and prosecution regarding decisions concerning the liberty of an arrested person during the pre-trial stage in the following words:[9]

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[7] Prosecution Policy: Item 6; See in general: Du Toit *et al, Commentary on the Criminal Procedure Act* vol 1, p 1-40P – 1-40W; *S v Makayi* 2021 (2) SACR 197 (ECB) paras 70&71.
[8] 2012 (1) SACR 305 (ECP) at para 33.
[9] *Ibid* para 32.

'Relative to the prosecutors, they owe a duty to carry out their public functions independently and in the interests of the public. In doing so he or she is obliged to act in accordance with the requirements of the Constitution and has to have regard to the rights of the accused person. Such rights include the accused's rights to bail and not to be detained arbitrarily and without just cause. Although the question of bail consideration is pre-eminently a matter for the judicial officer, the information furnished to the judicial officer can but come from the prosecutor. The latter has a duty to place before court any information relevant to the exercise of the discretion with regard to the granting or refusal of bail.' (emphasis added)

[23] Investigating officers are supposed to be present during criminal trials or at least readily available and this surely applies to bail proceedings as well. In *Director of Public Prosecutions, Northern Cape v Brooks and Others* [10] the court described the investigating officer as a 'key member of the prosecution team'. Surely this apply to bail matters as well. It is obvious that an investigating officer should in the course of the investigation of the case also gather evidence that might be relevant in the event of a bail application. The importance of this aspect cannot be over-emphasised, bearing in mind that too many bail applications are postponed for further investigation when bail should have been granted during the initial process of investigation.[11]

[24] In *Links v Minister of Safety and Security and Another*[12] the investigating officer did not oppose bail. There was also a failure to conduct an identification parade as instructed by a senior prosecutor. The court concluded that the continued incarceration of the plaintiff (the former accused) for more than two months after his arrest was unlawful. In *S v Ntozini*[13] the court dealt with criminal trials in general, but warned against the making of unsustainable submissions, the reason being that the overriding duty of the prosecutor is not to win cases, but to ensure that justice is done. It is expected of a prosecutor to act in a responsible and fair manner and to be candid and open to the court at all times.

[25] Although relevant to criminal proceedings in general, it is necessary to refer to the *locus classicus*, *Solomon v Magistrate, Pretoria (Solomon)*[14] which was recently

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[10] (509/19) [2020] ZASCA 80 (2 July 2020) at para 86.
[11] Joubert *Applied Law for Police Officials* 5th ed (2018) at p 23.
[12] (2271/10) [2015] ZAECPECH 18 (30 March 2015).
[13] 2009 (1) SACR 42 (E) 49d-h.
[14] 1950 (3) SA 603 (T)

referred to with approval in *Zuma v Downer and Another.*[15] In *Solomon* the court held that the prosecutor had undertaken a prosecution with an ulterior purpose, 'not with the object of having justice done to a wrongdoer, but in order to enable the prosecutor to harass the accused or fraudulently to defeat his rights'.

[26] In *Mahlangu and Another v Minister of Police*[16] the Constitutional Court disagreed with the judgment of the Supreme Court of Appeal and held as follows:
'The Supreme Court of Appeal's decision to relieve the Minister from liability for damages suffered by the applicants after a further remand order was made on 14 June 2005, implies that the obligation on members of the police to make proper and complete disclosure to the prosecutor of the facts relevant to the further detention of the applicants did not exist on the second court appearance. The obligation on the police to disclose all relevant facts to the prosecutor is to be regarded as a duty that remains for as long as the information withheld is relevant to the detention.'

Obviously, *Mahlangu* dealt with the liability of the Minister of Police for the neglect of one its employees. *In casu*, the opposite is true. The IO was prepared to grant bail as put on record by the applicant's attorney. The prosecutor, either did not contact the IO to establish the correctness thereof, or without reason disregarded the IO's disclosure that further detention was not required.

[27] In conclusion, Koppies is a small town in the Free State Province. The court and police station are probably within walking distance from each other. The IO was present at court before the applicant's case was called. There should have been communication between the IO and the prosecutor about the case and the intended application for bail. In any event, nowadays everybody is in possession of a cell phone and there is just no acceptable excuse for the prosecutor's failure to have contact with the IO. She neglected her duties and deprived the applicant of his freedom in employing an egregious stratagem. The DPP is not requested to hold a formal enquiry, but the prosecutor should be reminded that she is expected to carry out her functions without fear, favour or prejudice, but overall in good faith.

DAFFUE J

[redacted]

[15] 2024 (2) SA 356 (SCA) para 26.
[16] 2021 (2) SACR 595 (CC) para 37.

Appearances

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| For Applicant: | Adv J Potgieter |
| Instructed by: | ADRIAAN JANSE VAN RENSBURG INC<br>BLOEMFONTEIN |
| For the 1st respondent: | Adv M Strauss |
| Instructed by: | DIRECTOR OF PUBLIC PROSECUTIONS<br>BLOEMFONTEIN. |